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April 6, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand
Thomas Sugrue, Esq.
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, System Security and Integrity Regulations — AirTouch Communications, Inc. *Ex Parte* Presentation

Dear Mr. Sugrue:

As you are aware, on March 15, 1999, the Federal Communications Commission ("Commission") released a *Report and Order* establishing systems security and integrity regulations telecommunications carriers must follow to comply with Section 105 of the Communications Assistance for Law Enforcement Act ("CALEA").[1] Questions have arisen concerning new Section 64.2104 of the rules, which sets forth carriers' obligations to maintain secure and accurate records concerning interceptions. On behalf of AirTouch Communications, Inc., ("AirTouch") we submit the instant *ex parte* presentation in support of the March 29, 1999 *ex parte* previously submitted by the Cellular Telecommunications Industry Association ("CTIA") on this issue.[2]

Subsection (a) of new Section 64.2104 sets forth carrier recordkeeping requirements concerning interceptions, while subsection (b) establishes the record retention period (ten years in the case of accesses of call-identifying information and unauthorized interceptions, and a carrier-determined "reasonable" period in the case of interceptions of call content). Due to what appears to be a drafting error, however, the record retention

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1 Communications Assistance for Law Enforcement Act, Report and Order ("*Report and Order*"), CC Docket No. 97-213 (rel. March 15, 1999).

2 AirTouch has been an active participant in the various CALEA proceedings at the Commission.

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period in (b) is not made applicable to the certification-type records specified in (a), but instead appears, by its terms, to require the retention by carriers of an entirely different sort of record — namely, records of actual call content and call-identifying information. The text of the *Report and Order* (¶¶ 50-51) also references carrier retention of call content and information.

AirTouch does not believe the Commission intended this result, which was not proposed in the *Notice of Proposed Rulemaking* or the Comments, lacks any statutory authority, and raises a number of serious legal and policy concerns. If, as AirTouch expects, the Commission (or the appropriate staff officials) conclude that the rule and explanatory text lead to unintended result here, the error should be corrected immediately, before Federal Register publication of the *Report and Order*.

Attached is a memorandum discussing the record retention issue and the legal problems resulting from any interpretation of the rule to require *carrier* retention of actual call-identifying information and call content. For the reasons discussed in the attached memorandum, AirTouch respectfully urges the Commission to correct this drafting error by erratum, or by reconsideration of the *Report and Order* on the Commission's own motion, under § 1.108 of the rules. In this regard, also attached is a draft Erratum for possible Commission use.

Pursuant to § 1.1206 of the Commission's rules, two copies of this letter and attachments are being filed with the Secretary's office. Please contact us should you have questions concerning this submission, or should you require additional information. Thank you for your consideration of this important issue.

Sincerely yours,

WILKINSON, BARKER, KNUAER & QUINN, LLP

By: Luisa L. Lancetti
Counsel for AirTouch Communications, Inc.

Attachments

cc: James D. Schlichting
Jeanine Poltronieri
Julius P. Knapp
Magalie Roman Salas, Secretary
Michael Altschul

AIRTOUCH COMMUNICATIONS, INC.

***Ex Parte* Memorandum, CC Docket No. 97-213**

CONCERNS REGARDING FCC'S CALEA RECORD RETENTION PERIOD REQUIREMENT IN *CALEA SECTION 105 RULEMAKING* REPORT & ORDER

April 6, 1999

The *CALEA Section 105 Rulemaking*, CC Docket 97-213, *Report and Order*, FCC 99-11 (Mar. 15, 1999), establishes new § 64.2104 concerning carriers' obligation to maintain secure and accurate records concerning interceptions. Subsection (a) establishes that for each interception, the required record is a certification consisting of information concerning the legal authorization and timing of the interception, signed by an employee or officer of the carrier designated to carry out CALEA responsibilities; alternatively, the rule permits the designated official to sign a blank certification with a copy of the legal authorization attached. Subsection (b) establishes a retention period of ten years in the case of records of accesses to call-identifying information and unauthorized interceptions of communications, and a carrier-determined "reasonable" period in the case of records of authorized interceptions of communications.

The way the rule is drafted, however, these record retention periods are not made applicable to the certification records prescribed in (a), but instead to the actual call-identifying information and call content. The relevant text of the *Report and Order* (¶¶ 50-51) also takes this approach. For the reasons that follow, we believe this to be a drafting error that should be corrected as soon as possible.

- **No Statutory Authority.** The statutory authority under which the FCC undertook its decision, 47 U.S.C. § 229(b)(2), authorizes the FCC to establish rules to require common carriers "to maintain secure and accurate records of any interception or access with or without such authorization." Nothing in § 229(b)(2) (added to the Communications Act by § 301 of CALEA) authorizes the FCC to require carriers to record the actual content of communications intercepted or call-identifying information accessed by law enforcement. Under CALEA, carriers do not engage in such interception or access; they "expeditiously isolat[e] and enabl[e] the *government*" to intercept or access. CALEA § 103(a)(1)-(2), 47 U.S.C. § 1002(a)(1)-(2) (emphasis added). Since the government, not the carrier, performs the interception or access, the only records a carrier should have would concern how and when the government requested the carrier's assistance and how and when the carrier provided such assistance — *i.e.*, the types of records that the FCC prescribed in § 64.2104(a).

- **Contrary to Wiretap Law.** Under 18 U.S.C. § 2511(1)(a), it is a criminal act for any person to intentionally intercept "any wire, oral, or electronic communication" without specific statutory authorization. There is no such provision authorizing a carrier to intercept and retain copies of content or call-identifying information. Moreover, 18

U.S.C. § 2520(a) authorizes persons whose communications were intercepted without statutory authorization to recover civil damages from the party engaging in such interception.

- **Wiretap Law Recordkeeping Provision Inapplicable to Carriers.** 18 U.S.C. § 2518(8)(a), cited by the FCC in its rationale for the record-retention period rule, generally requires law enforcement agencies to make and retain secure, unedited recordings of lawfully intercepted communications as a means of ensuring the evidentiary integrity of such communications. It requires such recordings to be retained under seal for a minimum of ten years. It does not apply to call-identifying information or unauthorized interceptions, and it does not authorize *carriers* to make such recordings.

- **Beyond Scope of the NPRM.** The *NPRM,* FCC 97-356 (Oct. 10, 1997), did not propose requiring carriers to make and retain records of actual call content or call-identifying information. It devoted just two paragraphs (¶¶ 32-33) to recordkeeping, proposing to require dual affidavits concerning how and when interceptions and accesses are facilitated. There is no mention of records of actual call content or call-identifying information. The two-sentence discussion in ¶ 32 seeking comment on the record retention period does not indicate that the records to be retained are any other than the records of how and when interceptions and accesses are facilitated. While it mentions 18 U.S.C. § 2518(8)(a)'s ten-year retention period, it does so as a possible guidepost for an appropriate record retention period, and not as a proposal to require carriers to retain the actual content of communications or call-identifying information intercepted or accessed by law enforcement.

- **Not Adopted in Response to Comments.** The FCC did not adopt a requirement that carriers retain records of the content of communications and of call-identifying information in response to comments by either carriers or law enforcement. The *Report and Order,* in summarizing the comments (¶ 49), does not indicate that any party advocated such a requirement.

    - The comments by carriers advocated a variety of alternatives to the relatively cumbersome dual affidavit requirement contained in the *NPRM.* Several commenters noted that 18 U.S.C. § 2518(8)(a) is a record retention requirement imposed on law enforcement agencies, not carriers, and pertained to content. Several suggested that the section's ten-year record retention requirement was not an appropriate guideline for the carrier record retention period, with some noting that carriers do not possess recordings of content or call-identifying information and do not monitor interceptions.

    - The FBI initially concurred with the FCC's proposal, but later agreed with the industry proposals with respect to the nature of the records. The FBI did not

advocate any carrier record retention period and did not advocate that carriers be required to create records of content or call-identifying information.

- The FCC, in attempting to respond to carriers' comments concerning the limited scope of 18 U.S.C. § 2518(8)(a), crafted its rationale for the duration of the recordkeeping requirement (*i.e.*, the decision not to require a ten-year period for authorized interceptions and to require ten-year retention for others) in reference to that section. This appears to have resulted in an inarticulate description of the scope of the type of records subject to the recordkeeping period.

- **Public Policy Considerations.** Requiring carriers to record interceptions of communications and accesses to call-identifying information would clearly be a major new substantive rule with significant legal and policy implications requiring explicit notice and comment, including privacy issues and consideration of the significant burdens and costs associated with requiring recording of all interceptions.

POSSIBLE SOLUTIONS

If the requirement to make and preserve recordings of call content and call-identifying information is indeed a drafting error, it obviously should be corrected without delay. There are two ways in which the Commission can correct such an error without having to deal with petitions for reconsideration.

The first is an erratum giving a brief explanation and providing substitute text and rule language, ideally before publication in the Federal Register and the FCC Record; errata are typically issued under delegated authority. The second way to correct a drafting error is for the Commission to issue an order reconsidering the *Report and Order* on its own motion, pursuant to § 1.108, no more than 30 days after publication in the Federal Register. Such an order, which may be prompted by a post-release letter from the public, typically provides a more detailed explanation for any changes. For examples of both approaches in a single docket, *compare Implementation of Section 309(j) — Competitive Bidding,* PP Docket 93-253, *Erratum,* DA 95-19 (Jan. 10, 1995) *with Implementation of Section 309(j) — Competitive Bidding,* PP Docket 93-253, *Order on Reconsideration,* FCC 94-217 (Aug. 15, 1994).

An example of how the *Report and Order* might be corrected through an erratum is attached.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Communications Assistance for Law Enforcement Act	)	CC Docket No. 97-213

ERRATUM

Released: XXXXXXX XX, 1999

By the Chief, XXXXXXXX Bureau:

1. The *Report and Order*, FCC 91-11 (March 15, 1999), is hereby corrected to clarify that the recordkeeping periods in Section 61.2104(b) pertain to the records described in Section 61.2104(a). Certain language in the *Report and Order* appears, inadvertently, to indicate that Section 61.2104(b) requires retention of records different from those described and specified in Section 61.2104(a). This *Erratum* will, accordingly, eliminate such ambiguity.

2. Paragraphs 50-51 of the *Report and Order* are revised to read as follows:

> 50. Decision. The plain language of section 229(b)(2) requires carriers to maintain secure and accurate records of any interception of communications or access to call-identifying information. It does not, however, provide any direction regarding how long carriers should retain such records.[176] In establishing a retention period, we are sensitive to commenters' concerns about the cost of retaining records and agree that records should be retained only as long as reasonably necessary to comply with section 229(b)(2). We therefore adopt a two tier record retention requirement. First, we conclude that, in compliance with section 229(b)(2), carriers should maintain records concerning accesses to call-identifying information and unauthorized interceptions of communications for ten years. We choose a ten-year retention period to maintain consistency with the period for retention by law enforcement of content information in 18 U.S.C. § 2518(8)(a).[177] We believe this requirement is necessary because the record retention obligation imposed under 18 U.S.C. § 2518(8)(a) is limited to authorized interceptions of communications.[178] Neither section 2518(8)(a) nor the federal trap and trace statute[179] provides for the retention of records of accesses to call-identifying information. Moreover, section 2518(8)(a) does not

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176 47 U.S.C. § 229(b)(2).

177 18 U.S.C. §2518(8)(a) requires the "contents of any wire, oral or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. . . . [The recordings] shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years."

178 18 U.S.C. § 2518(8)(a).

179 18 U.S.C. § 3121 *et seq.*

encompass the retention of records of unauthorized interceptions of communications.[180] Thus, in order to ensure that records of accesses to call-identifying information and unauthorized interceptions of communications are maintained securely and accurately, we will require carriers to maintain the records described in Section III.C.(a) concerning accesses to call-identifying information and unauthorized interceptions of communications for ten years. We do not believe a ten-year record retention requirement will be unduly burdensome on carriers, given the modifications to our recordkeeping requirements in response to the comments. Moreover, we anticipate that carriers' policies and procedures will ensure that a carrier will not experience the occurrence of unauthorized interceptions at a frequency that would make the retention of these records overly burdensome.

51. With regard to the second tier, we decline to set a specific time period for maintaining records relating to authorized interceptions of communications. Given the record retention requirement imposed on law enforcement under 18 U.S.C. § 2518(8)(a), we find that imposing a duplicative ten year record retention requirement is unnecessary. Instead, we will require carriers to maintain secure and accurate records (as described in Section III.C.(a) above) regarding each authorized interception of communications for a period of time determined by them in accordance with the policies and procedures that they establish under section 229(b)(1) of the Communications Act and applicable state and federal statutes of limitation. As part of the policies and procedures that are submitted to the Commission for review, carriers must include a detailed description of how long they will maintain their records of intercept content. Further, the time period that carriers choose for their individual record retention must have a reasonable justification. Moreover, pursuant to our authority under section 229(c) of the Communications Act, we will modify any carrier's policy or procedure that we determine does not comply with our regulations.[181]

3. In Appendix A to the *Report and Order,* § 64.2104(b) is revised to read as follows:

(b) A telecommunications carrier shall maintain the secure and accurate records set forth in paragraph (a) for the following periods:

(1) In the case of access to call-identifying information or unauthorized interception of communications, for ten years;

(2) In the case of authorized interception of communications, for a reasonable period of time as determined by the carrier.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, XXXXXXXXXX Bureau

[180] 18 U.S.C. § 2518(8)(a).

[181] 47 U.S.C. §229(c).